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By order of the Court, Presiding Judge Roberto C. Naraja

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**IN THE SUPERIOR COURT
 FOR THE
 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

RAMON M. DELA CRUZ,)
)
Plaintiff,)
)
 v.)
)
JOEY P. SAN NICOLAS and the)
COMMONWEALTH OF THE)
NORTHERN MARIANA ISLANDS)
ELECTION COMMISSION,)
Defendants.)

CIVIL ACTION NO. 14-0220T

**ORDER GRANTING DEFENDANTS’
 MOTIONS TO DISMISS**

I. INTRODUCTION

THIS MATTER came before the Court for defendants’ motions to dismiss on December 2, 2014, and December 5, 2014, in Courtroom 202A. Plaintiff Dela Cruz (“Plaintiff”) was represented by Mark Hanson, Esq. Defendant San Nicolas was represented by Matthew Gregory, Esq. Chief Prosecutor Brian Flaherty represented the Commonwealth Election Commission (“CEC”).

Based on review of the filings, oral argument, and applicable law, the Court hereby issues this written decision GRANTING Defendant San Nicolas’ motion to dismiss Plaintiff’s felony voter claim following its oral pronouncement in Court. CEC’s motion to dismiss as an improper defendant is hereby DENIED, and Defendants’ renewed motion to dismiss Plaintiff’s remaining claims following the results of the recount is hereby GRANTED.

1 **II. BACKGROUND**

2 On November 11, 2014, Plaintiff filed a verified complaint contesting the November 4,
3 2014, mayoral election held on Tinian in which Defendant San Nicolas was the winner by a
4 margin of seven votes. (Pl.’s Compl. ¶ 21). The total number of votes for the mayoral
5 candidates was as follows: Dela Cruz-696, Cing-46, San Nicolas-703, for a grand total of 1,445
6 votes cast. *Id.* In Plaintiff’s complaint, five irregularities were alleged: (1) CEC’s failure to
7 include 10 votes physically cast on Tinian but not later tabulated on Saipan; (2) a four-vote
8 discrepancy between the amount of ballots actually dispersed but not accounted for at the
9 polling place; (3) seven votes cast by voters serving a sentence for a felony; (4) adulteration of
10 ballots by CEC; and (5) double voting by three absentee voters. *Id.* ¶ 22.

11 Subsequently, CEC filed its motion to dismiss asserting that: (1) they are an improper
12 defendant under the current election contest statutes; (2) Plaintiff’s complaint should be
13 dismissed because Plaintiff waived his right to challenge voter qualification after the election;
14 and (3) that Plaintiff’s complaint fails to set forth the actual prejudice requirement necessary
15 under the law.¹ (Def. CEC’s Mot. to Dismiss at 11). Defendant San Nicolas partially joined
16 CEC’s motion to dismiss and also filed his own motion asserting that dismissal of the felony
17 voter claim is appropriate due to lack of subject matter jurisdiction. (Def. San Nicolas’ Mot. to
18 Dismiss at 2).

19 Following defendants’ filings of their motions to dismiss, the first stage of the recount
20 (“Recount I”) was conducted on December 1, 2014, on Tinian. At Recount I, CEC recounted
21 the ballots for the Tinian mayoral election while also providing oral testimony outlining the
22 procedures that were being utilized. During the recount, ballots were segregated into four

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24 ¹ The Court ruled in its November 24, 2014, Order Setting Election Contest Hearing that Plaintiff set forth enough facts in his complaint to satisfy the actual prejudice requirement entitling him to a recount.

1 categories: (1) general election ballots; (2) Tinian early voting
2 ballots; and (4) absentee ballots. The four categories were counted separately. Additionally,
3 ballots were set aside if they were reconstructed ballots and were later verified by CEC and
4 tabulated accordingly.² At the close of the recount the total number of votes for each candidate
5 was as follows: Dela Cruz-696, Cing-47, San Nicolas-705, with a grand total of 1,448 votes
6 cast.³

7 The second part of the recount (“Recount II”) was held on December 3, 2014, on
8 Tinian. During Recount II, CEC recounted and inventoried the total number of ballots used
9 during the election. The CEC commissioners also accounted for and performed a
10 reconciliation of the absentee voter registration procedures. This accounting provided the
11 following computations: (1) CEC ordered 1,951 ballots; (2) 1,948 of those ballots were
12 inventoried on September 20, 2014; (3) the total number of ballots counted in the recount was
13 1,463; (4) 423 unused ballots were accounted for on December 2, 2014; (5) 60 absentee ballots
14 were never returned to CEC; (6) 5 ballots were reconstructed to replace mutilated ballots; and
15 (7) one ballot was rejected by CEC at the December 1, 2014, recount.⁴ These tabulations show
16 that CEC accounted for 1,952 ballots during the inventory process.

17 Following Recount II, both CEC and Defendant San Nicolas renewed their motions to
18 dismiss arguing that Plaintiff’s remaining claims were either resolved by the recount or failed
19 to satisfy the actual prejudice requirement under the statute.⁵

21 ² There were a total of 5 reconstructed ballots set aside that were later matched to 6 mutilated ballots in CEC’s
possession. CEC decided to reject the one unmatched ballot after determining that the reconstructed ballot was
most likely inadvertently counted earlier.

22 ³ The grand total increased by 3 votes from the original numbers reported by CEC on November 4, 2014.
These additional votes increased San Nicolas’ lead by 2 votes and increased Cing’s total by 1 vote.

23 ⁴ These tabulations show that there is a variance of 4 from the number of ballots inventoried on September 20,
2014, and the total number of ballots cast.

24 ⁵ Plaintiff’s felony voter claim was dismissed by the Court in its oral pronouncement on December 3, 2014.
Additionally, at the December 5, 2014 motion to dismiss hearing Plaintiff conceded that his fourth claim

1 **III. DISCUSSION**

2 Defendants have raised various issues in their motions to dismiss to which the Court
3 analyzes each separately below.

4 **A. PLAINTIFF’S FELONY VOTER CLAIM**

5 Defendant San Nicolas’ first motion to dismiss asserts that this court lacks subject
6 matter jurisdiction pursuant to NMI. R. Civ. P. 12(b)(1) because Plaintiff failed to exhaust
7 administrative remedies to properly challenge the seven felony voters⁶ prior to or on election
8 day. NMI Rule of Civil Procedure 12(b)(1) permits dismissal of a case where a court lacks
9 jurisdiction over the subject matter. *Atalig v. Commonwealth Election Comm’n*, 2006 MP 1
10 ¶ 16. If the court lacks jurisdiction, it has no authority to enter judgment and must dismiss
11 the case. *Id* . Courts will not review an agency decision unless an adequate showing has
12 been made that the party has exhausted its administrative remedies. *I.G.I. Gen. Contr. &*
13 *Dev. V. Public Sch. Sys.*, 1999 MP 12.

14 The election statutes set forth a detailed procedure for challenging a voter’s
15 qualifications. This procedure includes the requirement that a list of eligible voters be
16 provided for public examination not less than fifteen days before the day of election. 1 CMC §
17 6208. This list must be posted at the Commission and mayor’s office. *Id*. A voter may then
18 challenge the right of a person to vote any time prior to and including election day. 1 CMC §
19 6215(a)-(b). A voter qualification challenge must be made in writing, under penalty of perjury,
20 and lodged with the Executive Director of the CEC. 1 CMC § 6215(a)-(e). An appeal from the
21 Executive Director may then be taken to a three person panel, from which the challenge may

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regarding CEC’s adulteration of ballot was no longer viable after the recount and therefore withdrew that
claim.

23 ⁶ Although Plaintiff’s complaint asserts that the impropriety of seven felony voters, during the course of the
24 recount Plaintiff asserted that this number may have been reduced to two felons. This is further supported by
Plaintiff’s submitted witness list in that only two witnesses were labeled as felony voters.

1 then be taken to the Superior Court for judicial review. 1 CMC § 6215(e)(f). However, judicial
2 review is limited only to final agency action pursuant to the Administrative Procedures Act. 1
3 CMC § 9101.

4 In this case, Plaintiff failed to challenge the alleged seven felony voters prior to
5 Election Day and now seeks to challenge them after the time allotted by statute. The
6 legislature specifically provided a detailed rubric in which to bring a challenge, and Plaintiff
7 failed to follow such procedure. In failing to first exhaust his administrative remedies, Plaintiff
8 may not now bring this claim as part of an election contest. Therefore, dismissal of Plaintiff's
9 claim based upon the impropriety of seven felony voters participating in the mayoral election is
10 proper because this court lacks subject matter jurisdiction to hear the claim.⁷

11 **B. CEC AS A PROPER DEFENDANT**

12 CEC asserts in its initial motion to dismiss that it is not a proper defendant under the
13 current election contest statute; the Court disagrees.

14 The Commonwealth Election Law sets forth that when a voter contests an election,
15 he must specifically put forth the name of the defendant and the office the defendant sought.
16 1 CMC § 6603(a). The Commonwealth Rules of Civil Procedure allow for joinder of a
17 necessary party to the action when complete relief cannot be accorded among those already
18 parties. *See* MMI R. Civ. P. 19. Additionally, CEC has been a named defendant in
19 numerous election contest cases⁸ and has been joined *sua sponte* as a party to an election
20 contest by the court itself. *Hocog v. Mendiola*, Civ. No. 09-0471 (NMI Super. Ct. Nov. 21,
21 2009) (Order Requiring Joinder of the Commonwealth Election Commission).

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23 ⁷ Although CEC's motion to dismiss asserted the same challenge to Plaintiff's felony voter claim, the Court declines to analyze the issue under this theory.

24 ⁸ *See, e.g., Rebeunog v. Aldan*, Civil Action No. 09-0463; *Atalig v. CEC*, Civil Action No. 05-0516, *Hocog v. Mendiola*, Civil Action No. 09-0471.

1 This Court declines to adopt CEC's interpretation of the election contest statute in
2 such a way as to restrict its ability to be a named party. CEC is necessary as a party due to
3 the fact that the contestant is challenging CEC's actions during the election, not the winning
4 candidate's actions. It is imperative that CEC be a party so as it can defend the procedural
5 steps it took during the election. Also, without its joinder the Court would be powerless to
6 order its cooperation during the election contest process.⁹ Additionally, as was seen during
7 the recount, CEC was instrumental in detailing its procedures for the public. The Court
8 would be unable to understand this process without their presence the entire process would
9 be much more difficult. Thus, CEC is a proper defendant in an election contest case, and its
10 motion to dismiss as an improper defendant is denied.

11 **C. DISMISSAL OF PLAINTIFF'S REMAINING CLAIMS**

12 Both Defendants San Nicolas and CEC join in moving this Court to dismiss the
13 Plaintiff's complaint following the recount election because Plaintiff's claims have either
14 been resolved by the recount or they fail to satisfy the actual prejudice required by the
15 statute. For the reasons set forth below, the Court agrees with this assertion, and Plaintiff's
16 remaining claims are dismissed.

17 **1. Mis-tabulation of Votes Physically Cast on Tinian Claim**

18 As has been discussed above, only three of Plaintiff's five original claims in his
19 complaint are still before this Court. These are: (1) CEC's failure to include 10 votes
20 physically cast on Tinian but not later tabulated on Saipan; (2) a four-vote discrepancy
21 between the amount of ballots actually dispersed but not accounted for at the polling place;
22 and (5) double voting by absentee voters.

23 ⁹ CEC's attorney seemed to assert that the Court would be empowered to force CEC's cooperation without its
24 being a party. Such action would run afoul of a party's due process rights. Therefore, it would be improper for
the Court to attempt to assert its power in such a way.

1 Plaintiff's first claim concerning a possible mis-tabulation of votes by CEC has been
2 resolved through the recount process. CEC's November 4, 2014, tabulation shows that a
3 total of 837 votes were physically cast on Tinian, including votes cast in the general election
4 and early voting votes. Additionally, at the recount, CEC determined that a total of 840
5 votes had been cast on Tinian during the race. This means that there was a mis-tabulation
6 on CEC's behalf in the November 4, 2014 counting, but this problem was rectified by the
7 inclusion of the 3 additional votes during the recount. Thus, Plaintiff's claim regarding a
8 mis-tabulation was confirmed and corrected by the recount and is therefore no longer at
9 issue.

10 **2. Plaintiff's Remaining Claims Fail to Satisfy the Actual Prejudice Requirement**

11 Plaintiff's final challenge relates to the veracity of a total of seven votes. Following
12 the results of the recount, Plaintiff's remaining claims do not rise to the level of actual
13 prejudice and therefore must be dismissed.

14 A motion to dismiss a complaint pursuant to NMI R. Civ. P. 12(b)(6) tests the legal
15 sufficiency of the claims within the complaint. A complaint fails to satisfy the pleading
16 requirements of Rule 8(a) where it lacks a cognizable legal theory or fails to allege facts
17 constituting a cognizable legal theory. *Bolalin v. Guam Publications, Inc.*, 4 NMI 176
18 (1994). In considering a motion to dismiss, a court must "review the contents of a complaint
19 by construing it in the light most favorable to the plaintiff and accepting all well-pleaded
20 facts as true". *Zhang Gui Juan v. Commonwealth*, 2001 MP 18 ¶ 11 (citation omitted).

21 However, a complaint requires "more than a blanket assertion of entitlement to
22 relief". *Sayed v. Mobil Oil Marianas, Inc.*, 2012 MP 20 ¶ 20. Furthermore, the Court is not
23 required to accept conclusions that are contradicted by the complaint's own exhibits or other
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1 documents of which the court properly takes notice. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d
2 580, 558 (9th Cir. 2008). The court may take judicial notice of matters of public record.
3 *Oden v. Northern Marianas College*, 2003 MP 13 ¶ 7.

4 To bring an election contest case, Plaintiff must assert actual prejudice. 1 CMC
5 6602(a). For actual prejudice to exist, Plaintiff must present facts showing that the
6 irregularity or misconduct complained of resulted in Defendant being declared either elected
7 or tied for election. 1 CMC § 6602(a). “If the statements of the cause of the contest are
8 insufficient, the court may dismiss the proceedings for lack of evidence....” 1 CMC 6605(a).

9 As is clear from the statute, election contests are irregular in nature and thus do not
10 conform to normal rules of civil procedure. However, the Court does look to the rules of
11 civil procedure for guidance in determining whether Plaintiff’s remaining claims must be
12 dismissed. Accordingly, the Court views Plaintiff’s remaining claims in the light most
13 favorable to Plaintiff. However, Plaintiff’s remaining claims only challenge seven votes in
14 total¹⁰ and even if these seven votes were determined to be invalid, it would not be enough
15 to overcome Defendant San Nicolas’ nine vote lead after the recount. Therefore, in light of
16 the evidence obtained at the recount, Plaintiff’s remaining claims do not satisfy the actual
17 prejudice requirement, and Plaintiff’s complaint must be dismissed.¹¹

18 IV. CONCLUSION

19 For the foregoing reasons, Defendant San Nicolas’ motion to dismiss Plaintiff’s felony
20 voter challenge is granted, and CEC’s motion to dismiss as an improper defendant is denied.
21 Additionally, Plaintiff’s remaining claims do not rise to the level of actual prejudice in light of

22 ¹⁰ A four-vote discrepancy between the amount of ballots actually dispersed but not accounted for at the
23 polling place and possible double voting by three absentee voters.

24 ¹¹ At the December 5, 2014, motions to dismiss hearing Plaintiff asserted various procedures that should be
implemented by CEC to ensure for better ballot control measures. Although the Court does agree that
Plaintiff’s suggestions are logical, these changes would require legislative or rule making action.

1 the recount and therefore defendants' motion to dismiss the remaining claims is hereby
2 granted.

3 **IT IS SO ORDERED** this 11th day of December, 2014.

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5 /s/
6 **ROBERTO C. NARAJA**, Presiding Judge

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